

Betancourt v Delta Airlines, Inc.

2007 NY Slip Op 33824(U)

November 9, 2007

Supreme Court, Queens County

Docket Number: 0010102/2006

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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NERIDA E. BETANCOURT,

Plaintiffs,

- against -

DELTA AIRLINES, INC., THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, THE PORT AUTHORITY OF NY & NJ, Defendants.

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Number: 10102/06

Motion
Date: OCT. 16, 2007

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Cal. Number: 3
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The following papers numbered 1 to 19 read on this motion by defendants Delta Air Lines, Inc. ("Delta") and The Port Authority of New York and New Jersey (s/h/a The Port Authority of NY and NJ) ("PA") to dismiss the complaint, motion by the City of New York (s/h/a The City of New York and New York City Fire Department) ("the City") to dismiss the complaint and cross-motion by plaintiff to compel defendants to accept the complaint.

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Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by Delta and PA to dismiss the complaint on the grounds that the Court lacks subject-matter jurisdiction over the PA pursuant to CPLR 3211(a)(2), that the action against the PA is barred by the statute of limitations, pursuant to 3211(a)(5), and that the complaint fails to state a cause of action against the PA, pursuant to CPLR 3211(a)(7), and upon the ground that plaintiff failed to serve a timely complaint against Delta and the PA,

pursuant to CPLR 3012(b), is granted solely to the extent that the complaint is dismissed as against PA. That branch of the motion to dismiss the complaint as against Delta is denied.

Plaintiff alleges that she sustained injuries as a result of defendants' failure to maintain, service and operate the baggage carousel located at Terminal "D" at LaGuardia Airport in Queens County on April 16, 2005. According to the complaint, plaintiff's finger was amputated by a sharp top metal plate on the conveyor belt of the baggage carousel as she attempted to retrieve her baggage.

Plaintiff served a notice of claim upon PA on May 12, 2005. Plaintiff filed a summons with notice on May 4, 2006 and served it upon all defendants on May 8, 2006. The City served a notice of appearance and demand for the complaint on May 15, 2006.

On May 30, 2006, Delta served a notice of automatic stay upon plaintiff and co-defendants pursuant to a Chapter 11 bankruptcy petition that it had filed in Bankruptcy Court for the Southern District of New York on September 14, 2005, which filing effected an automatic stay of the underlying action against Delta.

On March 21, 2007, plaintiff and Delta stipulated to modify the automatic stay by allowing the action against Delta to proceed, but that any recovery against Delta may come only from any insurance coverage which Delta might have. The stipulation was so-ordered by the Bankruptcy Judge.

On May 9, 2007, Delta served plaintiff with a demand for a copy of the complaint, pursuant to CPLR 3012(b). Plaintiff served the complaint upon all defendants on June 21, 2007.

On July 11, 2007, Delta and the PA served their answer, which interposed as affirmative defenses lack of subject-matter jurisdiction, statute of limitations and failure to serve a timely complaint. The City also served its answer on July 11, 2007 containing the affirmative defense of failure to state a cause of action.

The Port Authority is a direct agency of the State of New York and, as such, is protected by the State's sovereign immunity and is, in the absence of consent by the State, completely immune from suits of any sort (see Trippe v. Port of New York Authority, 14 NY 2d 119 [1964]). In 1950, the Port Authority consented to be subject to suits (see NY L. 1950, Ch. 301; NJ Stat. Ann. §32:1-157 [1963]). However, said consent was granted, inter alia, "upon the condition that any suit, action or proceeding . . . shall be commenced within one year after the cause of action therefor shall have accrued" (McKinney's Unconsolidated Laws of NY §7107). The one-year time

constraint is mandatory for all suits against the Port Authority (see Trippe, supra). The failure to satisfy this condition will result in the withdrawal of the Port Authority's consent to be subject to suit, thus compelling dismissal of the action for lack of subject-matter jurisdiction (see Lyons v. Port Authority of New York and New Jersey, 228 AD 2d 250 [1st Dept 1996]).

Plaintiff's cause of action arose on April 16, 2005 but the summons with notice was not filed until May 4, 2006, thus rendering the action against the PA untimely. Therefore, not only is the PA entitled to dismissal of the complaint against it upon the ground that the statute of limitations for commencement of an action against the PA expired, but also upon the ground that the Court lacks subject-matter jurisdiction. Plaintiff does not oppose that branch of the motion for dismissal of the complaint against the PA.

Accordingly, the complaint and all cross-claims are dismissed as against the PA.

With respect to Delta, said defendant contends that it is entitled to dismissal of the action against it, pursuant to CPLR 3012(b), upon the ground that it was not timely served with the complaint.

CPLR 3012(b) provides that where the complaint is not served with the summons, service of the complaint must be served within 20 days after service of a demand therefore. That section also provides that defendant may move to dismiss the action if the complaint is not so served.

Delta served its demand for a copy of the complaint on May 9, 2007. Twenty days after May 9th was May 29th. However, since the demand was served by mail, an extra five days must be added to the time by which plaintiff was required to respond (see CPLR 2103[b][2]). Five days after May 29, 2007 is June 3rd, which was a Sunday. Therefore, plaintiff was required to serve a copy of the answer no later than the following business day, June 4, 2007 (see General Construction Law §25-a). Plaintiff served the complaint upon Delta on June 21, 2007, 17 days late.

Plaintiff cross-moves to compel the acceptance of the complaint. Pursuant to CPLR 3012(d), the Court may "compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

A plaintiff opposing a motion to dismiss for failure to serve a complaint within the 20-day period must ordinarily show a reasonable excuse for the delay and a meritorious cause of

action (see Amodeo v. Gellert and Quartararo, P.C., 26 AD 3d 705 [3rd Dept 2006]). Plaintiff has annexed to her cross-moving papers an affidavit articulating a meritorious claim. However, plaintiff has failed to proffer a reasonable excuse for her delay in serving defendants with a copy of the complaint within the 20-day time period. Counsel for plaintiff asserts as an excuse that on June 11th he called Delta's attorney to seek an extension of time to serve the complaint, but that Delta's attorney was not in. Counsel, thereupon, on said date, mailed Delta's attorney a stipulation extending plaintiff's time to serve the complaint until July 11, 2007. Delta's attorney did not sign the stipulation. Counsel states that he "had no reason to suspect that Mr. Brennan would not sign the stipulation." Counsel then served the complaint on June 21st. Counsel's erroneous belief that defendant's attorney would agree to an extension of time to serve the complaint does not constitute a reasonable excuse for the delay (see Allstate Ins. Co. v. Marrano Development Corp., 26 AD 3d 727 [4th Dept 2006]).

Nevertheless, a plaintiff need not establish a reasonable excuse for the delay or a meritorious claim where the delay is minimal (see Mills v. Niagra Mohawk Power Corp., 216 AD 2d 828 [3rd Dept 1995]). In view of the fact that plaintiff's delay of 17 days in serving the complaint was relatively minimal and not willful, and there is no showing, on this record, that defendants were prejudiced, and in light of the strong public policy favoring resolution of cases on the merits, it would not be an improvident exercise of this Court's discretion to compel defendants to accept the complaint (see Rait v. Bauer, 121 AD 2d 704 [2nd Dept 1986] [three-week delay after expiration of a two-week extension]; see also Friedman v. Ostreicher, 22 AD 3d 798 [2nd Dept 2005]). In addition, notwithstanding that neither a reasonable excuse for the delay nor a meritorious claim is required to be shown where the delay is short and not prejudicial, plaintiff has annexed to her cross-moving papers an affidavit of merit (see Rait v. Bauer, *supra*).

Accordingly, Delta's motion to dismiss the complaint must be denied.

Motion by the City to dismiss the complaint upon the ground that plaintiff failed to serve a timely complaint against it, pursuant to CPLR 3012(b), is also denied.

Since the City served plaintiff with its demand for the complaint on May 15, 2006, plaintiff's service of the complaint upon the City on June 21, 2007 was more than 13 months late. The filing of a Chapter 11 Bankruptcy petition by Delta only effected an automatic stay of the action against Delta (see Velez v.

Seymour, 278 AD 2d 164 [1st Dept 2000]; Golden v. Moscovitz, 194 AD 2d 385 [1st Dept 1993]). Since the service of the complaint upon the City approximately one year past the 20-day deadline was not a de minimis delay, plaintiff would, ordinarily have had to establish both a reasonable excuse for the delay and a meritorious cause of action.

Plaintiff has proffered a meritorious cause of action. The City's argument that plaintiff's affidavit of merit is lacking because it is not supported by a physician's affirmation is without merit. Plaintiff is competent to testify that her finger was, in fact, chopped off by the baggage conveyor. Since plaintiff is not maintaining a medical malpractice action against the City, counsel's argument that plaintiff's cross-motion should have been supported by a medical affirmation setting forth whether it was possible to have retrieved her finger and reattached it is of no merit.

Plaintiff's counsel, however, has failed to proffer a reasonable excuse for the delay in serving the complaint upon the City. Even were the Court to accept counsel's contention that the City did not object to the staying of the entire action against all parties, and that it was reasonable for him to have believed that there was a stay with respect to the City as well with respect to Delta, he fails to explain why he did not serve the complaint upon the City promptly after the stay was lifted on March 21, 2007. The delay of three months was not minimal so as to obviate the need to establish a reasonable excuse and a meritorious claim.

However, after plaintiff served the complaint upon the City on June 21, 2007, the City did not promptly reject it but retained it and served an answer as well as a demand for a bill of particulars and discovery demands. The City did not move for the instant relief until July 25, 2007. The City, moreover, did not raise plaintiff's failure to serve a timely complaint, pursuant to CPLR 3012(b), as an affirmative defense. The City raised only a generic affirmative defense that "Plaintiff's complaint fails to state a cause of action upon which relief can be granted." Therefore, since plaintiff served the complaint prior to the City's motion to dismiss, and the City did not reject it but answered it and sought amplification of it and discovery, the City waived its right to object to the timeliness of its service (see Volin v. City Beach Catering Corp., 166 AD 2d 583 [2nd Dept 1990]; Haygood v. Rochester General Hosp., 249 AD 2d 943 [4th Dept 1998]; Riesenberg v. Bachrach, 160 AD 2d 1190 [3rd Dept 1990]; see also Nasca v. Gertel, 5 AD 3d 361 [2nd Dept 2004] [where plaintiffs did not waive late service of the answer since it was served after plaintiffs moved for leave to enter default judgment]).

Accordingly, the City's motion to dismiss the complaint must also be denied.

Although the failure of plaintiff to articulate a reasonable excuse for the delay is not a basis to deny her cross-motion to compel defendants to accept the complaint, plaintiff's lack of diligence warrants the imposition of an appropriate sanction (see Gordineer v. Gallagher, 160 AD 2d 672 [2nd Dept 1990]; Rait v. Bauer, supra).

Accordingly, that branch of PA's and Delta's motion to dismiss the complaint is granted to the extent that the complaint is dismissed as against PA, there appearing no opposition to this branch of the motion. That branch of the motion seeking dismissal of the complaint as against Delta is denied. The City's motion to dismiss the complaint as against it is denied and plaintiff's cross-motion to compel defendants to accept the complaint is granted.

It is further ordered, sua sponte, that plaintiff's attorney shall pay to Delta's counsel \$100.00 representing the costs of this motion, pursuant to CPLR 8202, within 10 days of service of a copy of this order with notice of entry. Moving counsel shall demonstrate proof of payment of said costs at the time the note of issue is filed.

Dated: November 9, 2007

KEVIN J. KERRIGAN, J.S.C.